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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965.

No. 852

CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY,

Petitioner,

vs.

ILLINOIS COMMERCE COMMISSION EX REL. STATE OF ILLINOIS, DEPARTMENT OF PUBLIC WORKS AND BUILDINGS, DIVISION OF HIGHWAYS; CHICAGO AND NORTH WESTERN RAILWAY COMPANY; NORTHWESTERN STEEL AND WIRE COMPANY; AND THE CITY OF STERLING, WHITESIDE COUNTY, ILLINOIS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

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THE GUNTHROP-WARREN PRINTING COMPANY, CHICAGO

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Illinois entered on September 28, 1965 (Rec. 10).

CITATION TO OPINION BELOW.

The opinion of the Supreme Court of Illinois has been published in 211 N. E. (2d) 279. The opinion is printed in Appendix A hereto.

JURISDICTION.

The judgment of the Illinois Supreme Court was entered on September 28, 1965 (Rec. 10). Rehearing was denied on November 18, 1965 (Rec. 13). The jurisdiction of this court is invoked under 28 U. S. C. Section 1557 (3).

QUESTION PRESENTED.

The question presented is whether it was a denial of due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States for the Illinois Supreme Court to have affirmed the judgment of the trial court from which the appeal was taken without the Illinois Supreme Court having passed upon the issues raised in the Illinois Supreme Court by petitioner.

STATUTE INVOLVED.

The statute involved in the appeal by the petitioner to the Illinois Supreme Court is Sec. 58 of the Illinois Public Utility Act (Sec. 62, Ch. 111⅔ Ill. Rev. Stat., 1963) which provides as follows:

> "No public road, highway, or street shall hereafter be constructed across the track of any railroad company at grade, nor shall the track of any railroad company be constructed across a public road, highway or street at grade, nor shall the track of any railroad company be constructed across the track of any other railroad or street railroad company at grade, nor shall the track of a street railroad company be constructed across the track of a railroad company at grade, without having first secured the permission of the commission. Provided, that this section shall not apply to the replacement of lawfully existing roads, highways and tracks. The commission shall have the right to refuse its permission or to grant it upon such terms

and conditions as it may prescribe. The commission shall have power to determine and prescribe the manner, including the particular point of crossing, and, the terms of installation, operation, maintenance, use and protection of each such grade crossing."

STATEMENT.

The facts relative to the appeal to the Illinois Supreme Court are accurately stated in the opinion of the court (Appendix A, p. 9).

Petitioner appealed to the Illinois Supreme Court from an order of the Circuit Court of Whiteside County which had affirmed an order of the Illinois Commerce Commission granting the Department of Public Works and Buildings the authority to extend a street at grade level across petitioner's tracks (Illinois Supreme Court Opinion, Appendix A, p. 9). In the brief filed by petitioner in the Illinois Supreme Court (Rec. 5) it raised the following issues:

1. The finding of the Illinois Commerce Commission that the opening of the street would facilitate the passage of emergency vehicles was unreasonable and arbitrary (Brief, Division II of Points and Authorities; Division II of Argument).

2. The finding of the Illinois Commerce Commission of the presence of traffic congestion in the area was unreasonable and arbitrary (Brief, Division III of Points and Authorities; Division III of Argument).

3. The finding of the Commission that the opening of the street would convenience school children was unreasonable and arbitrary (Brief, Points and Authorities, Division IV; Argument, Division IV).

4. The opening of the street across petitioner's tracks at grade level would seriously impair petitioner's switching

operations (Brief, Division V of Points and Authorities; Division V of Argument).

The opinion of the Illinois Supreme Court consists of but ten paragraphs. The first seven give the nature of the case, a description of the area in question and a description of the proposed grade crossing. The court stated in the eighth paragraph with brevity that petitioner contended that there was no substantial evidence to support the order of the Commission and that the extension of the street would impair petitioner's switching operations.

Nowhere in these eight paragraphs (or elsewhere in the opinion) did the court state what the issues were (to which we have previously referred that were raised in Divisions II, III and IV of petitioner's brief) in support of its contention that there was no substantial evidence to support the order of the Commission.

In the ninth and tenth paragraphs of the opinion, the court affirmed the order of the trial court confirming the order of the Illinois Commerce Commission without even mentioning the issues raised by petitioner. The opinion merely gave the conclusion of the court that "after examining the record we cannot say that the findings and order of the Commission were against the manifest weight of the evidence."

There is not a syllable in the opinion regarding how or why it was not reasonable for the Commission to find that the opening of the street would facilitate the passage of emergency vehicles or that there is traffic congestion in the area or that the opening of the street would convenience school children.

The only issue raised by petitioner which was mentioned at all by the court was the one relating to the impairment of its switching operations. The court said, "While the proof establishes that some inconvenience will be suffered

by the Burlington, it is apparent on the other hand that the proposed changes will be to the best interest and safety of the public." Even the determination of that issue was inconsistent with an earlier finding in the opinion in the seventh paragraph that, "The proposed extension of Avenue F would result in impairment of the Burlington's switching operations."

Petitioner filed a petition for rehearing in the Illinois Supreme Court in which it raised the issue that the failure of the court to pass upon the issues raised in its brief was a denial of due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States (Rec. 12, petition for rehearing). The court denied the petition for rehearing (Rec. 13).

REASONS FOR GRANTING WRIT OF CERTIORARI.

The Illinois Supreme Court clearly failed to pass upon the issues raised by petitioner in that court. The nearest the court came to passing upon these issues is in the ninth paragraph of the opinion in which it is stated that after examining the record the court could not say that the findings and order of the Commission were against the manifest weight of the evidence.

That finding was only a conclusion upon the ultimate question in the case, namely whether public convenience and necessity had been established. The opinion is silent upon the underlying issues raised by petitioner. In any case of this kind whether public convenience and necessity requires the opening of a street across a railroad depends upon the particular issues in the case.

Public convenience and necessity is only the ultimate question, the determination of which depends upon the underlying issues. Public convenience and necessity is merely the final adjudication after the particular issues have been

passed upon to determine whether public convenience and necessity is present. For the court to say, as it did here, that the testimony of the individuals it mentioned "tended to show that public safety, convenience and necessity" required the street extension is merely to determine the ultimate question without determining the issues raised by petitioner upon which the ultimate question depends.

No person reading the opinion of the court, and without having read petitioner's brief, could ascertain what the issues were that petitioner raised in support of its contention that the findings of the Commission were unreasonable and arbitrary, except the inconsistent finding about the impairment of petitioner's switching operations. The opinion does not so much as mention the issues.

For example, let us say that in an appeal of a judgment in a personal injury case, the ultimate question to be determined is whether the trial court should have entered judgment against the defendant upon a verdict in favor of the plaintiff. The defendant raised the issue that incompetent evidence was admitted without which there was no evidence whatsoever that defendant was guilty of negligence. In its opinion the reviewing court merely stated the ultimate fact that negligence had been established without even a reference to the issue raised by defendant that the judgment depended upon incompetent evidence. It clearly could not be said that the court passed upon the issue which the defendant had raised.

In its opinion in this case, the Illinois Supreme Court did not even refer to one item of evidence upon which the ultimate question of public convenience and necessity depended. This is a departure from its prior practice in other cases involving the reasonableness of orders of the Illinois Commerce Commission where it has recited enough of the evidence so that it could be seen whether the standards

of reasonableness had been met (Cf., *Citizens Valley View Co.* v. *Illinois Commerce Commission*, 28 Ill. (2d) 294, 192 N. E. (2d) 392, 1963; *Thompson* v. *Illinois Commerce Commission*, 1 Ill. (2d) 350, 115 N. E. (2d) 622, 1958; *Illinois Central Railroad* v. *Illinois Commerce Commission*, 397 Ill. 399, 74 N. E. (2d) 893, 1947).

The duty of a reviewing court of a state to pass upon issues submitted to it is a right guaranteed by the Fourteenth Amendment to the Constitution of the United States. While the highest court of a state has the supreme power to interpret the laws of a state and neither an erroneous decision nor the overruling of a previous decision will give rise to a claim under the Fourteenth Amendment; yet where such a court upon appeal refuses to pass upon a relevant issue submitted by a party, it is a denial of due process of law (*Brinkerhof-Faris Co.* v. *Hill*, 281 U. S. 673, 680, 681, 1930). In such a case where the party adversely effected raises in its petition for rehearing in the state court that the action of the court in failing to pass upon the issues is a denial of due process of law as assured by the Fourteenth Amendment, the federal question is raised timely because it is made at the first opportunity (*Ibid.* pp. 677-678).

The Illinois Supreme Court itself holds that due process of law guarantees a party the right to be heard upon the issues raised in a judicial proceeding (*Burket* v. *Reliance Bank and Trust Co.*, 367 Ill. 196, 11 N. E. (2d) 6-9, 1937; *O'Connor* v. *Rathje*, 368 Ill. 83, 12 N. E. (2d) 878-879, 1937). Petitioner submits that the constitutional guaranty of due process assuring a party in a judicial proceeding the right to be heard upon relevant issues which he raises no less applies in a proceeding in a reviewing court than in a trial court.

Petitioner further submits that where, as here, rele-

vant issues are submitted by a party in its brief and the court fails to pass upon them in its opinion; and fails to do so a second time when the party's petition for rehearing specifically calls to the attention of the court that the issues were not passed upon and that the guaranty of due process of law of the Fourteenth Amendment will be taken from the party unless the issues are passed upon, the action of the reviewing court in failing to pass upon the issues is clearly one of refusal to pass upon the issues and not one of oversight; and is a denial of due process of law.

If the opinion of the court had passed upon the issues raised by petitioner by determining them in its favor it could not have determined that public convenience and necessity had been established. It would then have reached a conclusion contrary to the conclusion it reached here. On the other hand, if the court had passed upon the issues adversely to petitioner, it then would have determined that public convenience and necessity had been established. In either case, the court would have accorded petitioner due process of law. Neither, however, is the case here.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

OPINION OF THE SUPREME COURT OF ILLINOIS.
(Rec. 7.)

Docket No. 39104—Agenda 24—May, 1965.

Chicago, Burlington & Quincy Railroad Company, Appellant, *v.* Illinois Commerce Commission *et al.*, Appellees.

MR. JUSTICE HOUSE delivered the opinion of the court:

The Chicago, Burlington & Quincy Railroad (Burlington) has appealed from an order of the circuit court of Whiteside County confirming an order of the Illinois Commerce Commission granting the Department of Public Works and Buildings of the State of Illinois permission to extend Avenue F at grade across the tracks of the Burlington and the Chicago and North Western Railroad (North Western) in the city of Sterling. The appeal is pursuant to section 69 of the Public Utilities Act. Ill. Rev. Stat 1963, chap. 111⅔, par. 73.

In February, 1962, the Department of Public Works and Buildings filed with the Commission its petition for permission to separate the grade of Avenue G from the North Western tracks, and for the extension of Avenue F across the tracks of the North Western and Burlington. (Avenue F has heretofore ended short of the tracks.) On May 31, 1962, the Commission entered an order granting the proposed separation of grade at Avenue G and denying the proposed extension of Avenue F.

In June, 1962, the Northern Illinois Water Corporation filed its petition for leave to intervene and for a rehearing

on the Commission's order of May 31, 1962. The city of Sterling filed a petition for rehearing in July, 1962 averring, among other things, that the extension of Avenue F at grade level was necessary for the safety and welfare of the citizens of Sterling apparently because of the limited access of emergency and other vehicles into the area. The Commission allowed the water company to intervene and granted the petitions for rehearing, but only with respect to that part of its order which related to the proposed extension of Avenue F.

The Burlington then filed its cross-petition seeking to have a pedestrian crossing at grade retained at Avenue G. On September 25, 1962, the Commission entered an interim order requiring the maintenance of such a pedestrian crossing. Finally, on October 24, 1962, the Commission entered its order granting permission to extend Avenue F at grade and ordering that the pedestrian crossing at Avenue G be discontinued.

The proposed extension of Avenue F would provide a third access street across the Burlington and the North Western railroad tracks to the area lying between the Rock River on the south and the railroad tracks on the north. A Northwestern Steel and Wire Company plant, employing about 3,000 men on a three shift basis, lies along the north bank of the Rock River between Avenue B on the east and Avenue K on the west. The area between the tracks and the river is primarily industrial, but there are about 400 inhabitants, including some 225 children, living there. There are two east-west streets, Wallace and Miller, between the tracks and the river, and two north-south streets, Pike and Bass, which connect Wallace and Miller but do not cross the tracks or the river.

Avenue B, and Avenue K which is 3450 feet to the west, are presently the only means of access to this area from north of the railroad tracks. Prior to the Commission's

order of May 31, 1962, authorizing the separation of the grade of Avenue G and the Burlington and North Western railroad tracks, Avenue G, located midway between Avenues B and K, provided a third means of access to that area. However, it also continued up a grade to a bridge over the Rock River, thereby carrying through traffic between Rock Falls and Sterling. To facilitate the flow of this through traffic, the Commission authorized the construction of an Avenue G overpass from north of the railroad tracks directly to the bridge over the Rock River, so that traffic between Rock Falls and Sterling would over-pass the congested area between the river and the Burlington and North Western tracks. Access to this industrial and residential area by means of Avenue G would thus be eliminated, but Avenue F, one block east of Avenue G, would provide a substitute access street.

The tracks of the Burlington end west of the proposed extension of Avenue F, 100 feet east of Avenue G. From this point west, the Burlington uses the tracks of the North Western. It conducts its switching operations between Avenue B and Avenue G and also uses two interchange tracks between Avenues B and G with the North Western. The proposed extension of Avenue F would result in impairment of the Burlington's switching operations in that it would have to break up its trains at Avenue F to avoid blocking traffic. Extensive hearings were held and the record consists of more than 700 pages of testimony and 67 exhibits. On the basis of this record, the Commission made findings with respect to the type of area to be served, the volume and kind of traffic to, from and in the area, the ability of emergency vehicles to serve the area, and the amount of pedestrian traffic, especially children, across the railroad tracks.

The Burlington contends (1) that there is no substantial evidence in the record to support the order, therefore it is arbitrary and unreasonable, and public safety, convenience

and necessity were not established, and (2) that the extension of Avenue F at grade across its tracks would seriously impair its switching operations.

After carefully examining the record in this case we cannot say that the findings and the order of the Commission were against the manifest weight of the evidence. The testimony of the fire chief, police chief, mayor, traffic officer, city engineer, school superintendent, and several city councilmen from Sterling tended to show that public safety, convenience and necessity require the extension of Avenue F at grade to take people into and out of this area as a substitute for Avenue G. While the proof establishes that some inconvenience will be suffered by the Burlington, it is apparent on the other hand that the proposed changes will be to the best interest and safety of the public. Under the provisions of section 68 of the Public Utilities Act (Ill. Rev. Stat. 1963, chap. 111⅔, par. 72), the Commission's findings are *prima facie* true. Unless it clearly appears that the Commission's findings are against the manifest weight of the evidence, or that the Commission lacked jurisdiction to enter the order, its order should not be set aside. *Galt* v. *Illinois Commerce Com.*, 28 Ill. 2d 501; *Forest Preserve District of DuPage Co.* v. *Illinois Commerce Com.*, 12 Ill. 2d 319; *Chicago Junction Railway Co.* v. *Illinois Commerce Com.*, 412 Ill. 579.

The judgment of the circuit court of Whiteside County confirming the order of the Illinois Commerce Commission is affirmed.

JUDGMENT AFFIRMED.

APPENDIX B.

JUDGMENT OF SUPREME COURT OF ILLINOIS.
(Rec. 10.)

Be It Remembered, that, to-wit: on the 28th day of September, 1965, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said Court, had and entered of record, to-wit:

Chicago, Burlington & Quincy Railroad Company, *Appellant,* No. 39104 *vs.* Illinois Commerce Commission ex rel., State of Illinois, Department of Public Works and Buildings, Division of Highways; Chicago and North Western Railway Company; Northwestern Steel and Wire Company; and the City of Sterling, Whiteside County, Illinois, *Appellees.*	Appeal from Circuit Court, Whiteside County 63 - L - 3.

And now, on this day, this cause having been argued by counsel, and the Court, having diligently examined and inspected as well the record and proceedings aforesaid, as matters and things therein assigned for error, and now, being sufficiently advised of and concerning the premises for that it appears to the Court now here, that neither in the record and proceedings aforesaid, nor in the rendition of the judgment aforesaid, is there anything erroneous, vicious or defective, and in that record there is no error.

Therefore, it is considered by the Court that the judgment of the Circuit Court of Whiteside County aforesaid, Be Affirmed in All Things and Stand in Full Force and Effect, notwithstanding the said matter and things therein assigned for error.